

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION**

**JAMES W. WARRINGTON and
SPECTRUM ENTERTAINMENT OF
MISSISSIPPI, INC.**

Plaintiffs

v.

Civil Action No. 4:94CV119-D-O

**CHARLES SIDNEY GIBSON and
JACK A. GIBSON**

Defendants

MEMORANDUM OPINION

The court now comes to consider defendants', Charles Sidney Gibson and Jack A. Gibson, motion to dismiss for lack of in personam jurisdiction, for improper venue and/or, alternatively, for failure to state a claim upon which relief can be granted.

FACTUAL BACKGROUND

James W. Warrington and Spectrum Entertainment ("Spectrum"), a Mississippi corporation, wholly owned by Warrington, owned certain assets in Mississippi, including a promissory note secured by real property located in Washington County, Mississippi. Warrington and Spectrum apparently entered into some type of business transaction with defendants Charles Sidney Gibson ("C. Gibson") and Jack Gibson ("J. Gibson"), who were Arkansas residents, and/or Rivertimber and Materials Storage and Transportation, Inc. ("Rivertimber"), an Arkansas corporation. Of relevance to this motion, as part of this transaction, the parties proposed to acquire certain real property, and timber resources thereon, known as Brandywine Island. As best the court can determine, Brandywine is a Mississippi River Island located partially in Crittenden County, Arkansas and partially in either or both Tipton County or Shelby County, Tennessee. To facilitate the purchase of Brandywine Island, Warrington and Spectrum assigned to Rivertimber their interest in the aforesaid promissory note, secured by real property in Washington County, Mississippi. Rivertimber, in which Warrington and Spectrum had acquired some interest, subsequently entered into a loan transaction with

Commercial Bank & Trust Company of Monticello, Arkansas ("Commercial Bank"),¹ to finance, at least in part, the Brandywine purchase. The loan was secured by the aforesaid promissory note assigned by Rivertimber to Commercial Bank. Warrington and the Gibsons negotiated and executed several other agreements in early 1993. These agreements included obligations of both the plaintiffs and defendants in regard to the financing and sharing of proceeds expected from the aforesaid purchase. The present lawsuit resulted from the apparent failed purchase of Brandywine Island.

Warrington brings this cause of action against the Gibsons claiming that the court should rescind agreements entered into between the parties on January 4, 1993, and February 27, 1993. Both of the agreements pertained to the purchase of Brandywine Island and both specifically discussed the purchase as it related to the promissory note secured by real property in the State of Mississippi. The complaint also charges defendant C. Gibson with legal malpractice based on his alleged agreement to represent Warrington in an earlier lawsuit styled United States Fidelity & Guaranty Co. v. Warrington, et al., Civil Action No. 3:91-CV-0089(B)(C), (S.D. Miss. 1993)(hereinafter "USF&G litigation").² Defendants have moved for dismissal for lack of personal jurisdiction and for lack of venue. C. Gibson also moves for 12(b)(6) dismissal of plaintiffs' legal malpractice claim.

DISCUSSION

I.

PERSONAL JURISDICTION

A nonresident defendant is subject to personal jurisdiction in a federal diversity suit to the extent permitted by the laws of the forum state and considerations of constitutional due process. Bullion v. Gillespie, 895 F.2d 213, 215 (5th Cir. 1990). The extent of federal jurisdiction over the

¹ Commercial Bank was named as a defendant in the present lawsuit. On March 29, 1995, in an order granting a joint motion of plaintiffs and Commercial Bank, the undersigned dismissed Commercial Bank as defendant in this cause of action.

² On February 4, 1993, Chief Judge William H. Barbour, Jr., entered summary judgment in favor of USF&G against Mr. Warrington. The court so ruled on the merits finding that Warrington was guilty of fraudulent misrepresentation to obtain insurance benefits from USF&G. USF&G at 6.

nonresident defendant is determined by a two-step inquiry: (1) the defendant must be amenable to service of process under the forum state's jurisdictional long-arm statute, and (2) the exercise of jurisdiction under the state statute must comport with the dictates of the due process clause of the Fourteenth Amendment. Dalton v. R & W Marine, 897 F.2d 1359, 1361 (5th Cir. 1990). Once personal jurisdiction has been challenged, plaintiffs bear the burden of establishing this court's jurisdiction over nonresident defendants. However, plaintiffs need not make a full showing on the merits that jurisdiction is proper but must make a prima facie showing of the facts upon which in personam jurisdiction is predicated to avoid dismissal for lack of jurisdiction. In this regard, "the allegations of the complaint, except as controverted by the defendants' affidavits, must be taken as true." Strong v. RG Industries, Inc., 691 F.Supp. 1017, 1018 (S.D.Miss. 1988)(internal citations omitted).

A.

Mississippi's long-arm statute, Miss. Code Ann. § 13-3-57, provides in relevant part:

Any non resident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state.

Miss. Code Ann. § 13-3-57 (Supp. 1993). The long-arm statute's reach should be determined initially because consideration of the constitutional issue is not necessary if service was defective under the Mississippi statute. Thompson v. Chrysler Motors Corp., 755 F.2d 1162, 1167 (5th Cir. 1985).

The Mississippi Supreme Court has construed § 13-3-57 as applicable to three types of nonresident defendants: (1) nonresidents who make a contract with a Mississippi resident to be performed in whole or in part within the state; (2) nonresidents who commit a tort in whole or in part within the state against a resident or nonresident; and (3) nonresidents who are "doing business" within the state. Thompson, 755 F.2d at 1167-68 n.5 (citing Smith v. Temco, Inc., 252 So.2d 212, 214-16 (Miss. 1971)). The Mississippi long-arm statute's reach is broad. It allows Mississippi courts

to exercise jurisdiction over nonresident defendants whose conduct within the state has caused an alleged injury (specific jurisdiction), and over nonresident defendants who have availed themselves to the protection of the laws of the state of Mississippi (general jurisdiction).

The long-arm statute requires the satisfaction of at least one of its conditions before it may be utilized. Plaintiffs claim that the defendants fall under the contract prong of the Mississippi long-arm statute.

1) CONTRACT

Did Warrington and the Gibsons enter into a contract "to be performed in whole or in part by any party in this state." Warrington first argues that the assignment of the promissory note secured by real property in Mississippi from Spectrum to Rivertimber provides this court with long-arm jurisdiction under the contract prong of the statute. He also claims that the agreements between the parties concerning the purchase of Brandywine Island which require actions in this state meet the necessary statutory requirements. Do these business transactions involve "making a contract in this state to be performed in whole or in part within this state"? Initially, the court would note that merely contracting with a resident of the forum state is insufficient to subject the nonresident to the forum's jurisdiction. Colwell Realty Investments v. Triple T Inns, 785 F.2d 1330, 1334 (5th Cir. 1986). For the reasons stated below, the undersigned is of the opinion that the agreements purportedly reached between the parties in this litigation involving the attempted purchase of Brandywine Island require actions in this state and, therefore, defendants fall under the broad reach of the Mississippi long-arm statute.

Spectrum, a Mississippi Corporation, was the holder of a promissory note in the principal sum of \$725,000.00. The debtor on the note was Spectrum Gaming of Mississippi, Inc., also a Mississippi corporation. The promissory note is secured by a deed of trust on property located in Washington County, Mississippi. The note specifically states that it "is to be construed according to the laws of the State of Mississippi, where it is executed, and secured by a trust deed on real estate...." On January 4, 1993, Warrington, as an agent of Spectrum, assigned the promissory note to Rivertimber,

the Gibson's corporation. The document indicated that the assignment was for the "purpose of enabling Rivertimber to reassign the same to Commercial Bank and Trust Company of Monticello, Arkansas, as security for a loan made by Rivertimber in the principal amount of Two Hundred and Fifty Thousand Dollars (\$250,000)." The record reflects that the note was ultimately assigned to Commercial Bank as security for a \$250,000.00 loan. As the promissory note which is secured by real property in this state was used by the defendants to secure a loan for payment of their share of the purchase price of Brandywine Island, the court is of the opinion that defendants have entered into a contract (i.e a business relationship) with a Mississippi resident that will be performed in whole or in part here.

The parties also entered into two agreements, one of which was signed and executed in this state, involving the purchase of Brandywine Island. The agreements, which were entered into on January 1, 1993, and February 27, 1993, provide further proof of the defendants' sufficient contact with this state and their contemplation of at least part performance of contractual obligations in this state. Both agreements reference the aforesaid promissory note and provide detailed instructions on repayments. As previously noted, this note is secured by property in Washington County, Mississippi. Should payment on the note come into default, Mississippi real property provides security. Under the circumstances, the assignment would be acted upon "in whole or in part" in this state. It follows that the agreements, which directly discuss payments on the promissory note, may well be carried out in some form or fashion in this state.

Lastly, plaintiffs bring a claim against C. Gibson for legal malpractice based on Mr. Gibson's alleged agreement to represent plaintiffs in the previously mentioned USF&G litigation. Defendant C. Gibson denies that he ever undertook representation of plaintiffs. Warrington has presented no contract of employment, however, he claims that C. Gibson orally agreed to represent him. He does submit the affidavit of Paul E. Rogers who testified that, in the fall of 1992, he met with Warrington and C. Gibson to discuss certain matters in regard to the Brandywine purchase. At the meeting, there was a discussion about the USF&G litigation and its possible effect on the purchase of Brandywine

Island. Mr. Rogers stated that "it was my impression and belief that Charles Sidney Gibson was representing the interest of Mr. Warrington... in the USF&G litigation." Although plaintiffs have provided little evidence in support of their claim that C. Gibson undertook to represent them in the USF&G litigation, as found below, the court is of the opinion that dismissal of this claim is inappropriate. Clearly, should the plaintiffs establish an attorney-client relationship between them and C. Gibson in regard to the USF&G litigation, such a relationship would be sufficient to provide this court with long-arm jurisdiction.

To summarize, defendants played an active role in developing and extending a business relationship with a Mississippi resident. They negotiated extensively with a Mississippi plaintiffs in an effort to secure their interest in Brandywine Island. Defendants cultivated a relationship with Warrington and Spectrum and could reasonably expect to answer for any alleged misdeeds arising out of that relationship in Mississippi. The court is of the opinion that it does have personal jurisdiction over the defendants under the contract prong of the Mississippi long-arm statute.³

B.

Once the court determines that the state law prong of the jurisdictional analysis is satisfied, the plaintiffs must still demonstrate that the exercise of jurisdiction comports with the due process

³ Plaintiffs additionally argue that the "doing business" prong of § 13-3-57 provides this court with personal jurisdiction over the defendant. This court does not agree.

The Fifth Circuit provided guidance when applying this prong in Cycle LTD. v. W.J. Digby, Inc., 889 F.2d. 612, 620 (5th Cir. 1989):

this court has distilled three prerequisites to the assertion of federal court jurisdiction in Mississippi over nonresident corporate defendants: (1) the defendant must conduct business in the state of a systematic and ongoing nature; (2) the cause of action need not be directly connected with the activity but must at least be "incident to" that business activity; and (3) the assertion of jurisdiction must not offend notions of fairness or substantial justice. Aycock v. Louisiana Aircraft, Inc., 617 F.2d 432, 435 (5th Cir. 1980), cert. denied, 450 U.S. 917, 101 S.Ct. 1361, 67 L.Ed.2d 343 (1981).

Cycle LTD. at 620. There is no evidence here that defendants conduct business in this state of a systematic and ongoing nature. Had defendants not been amenable to jurisdiction under the contract prong, this court would lack personal jurisdiction.

clause of the Fourteenth Amendment. The court must find that the nonresident defendants have (1) purposefully established "minimum contacts" with the forum state and, if so, (2) that entertainment of the suit against the nonresident would not offend "traditional notions of fair play and substantial justice." Bullion v. Gillespie, 895 F.2d 213, 216 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945)).

1) MINIMUM CONTACTS

The court first addresses the minimum contacts requirement. The defendant has the requisite minimum contacts with a state when it "purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denkla, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). At this stage of the analysis, the focus is upon the nature of the underlying litigation. Dalton v. R & W Marine, Inc., 897 F.2d 1359, 1361 (5th Cir. 1990). Minimum contacts with the forum state may arise incident to the federal courts's "general" or "specific" jurisdiction over the nonresident defendant. The court may exercise specific jurisdiction when the suit "arises out of or is related to" the defendant's contacts with the forum. Petroleum Helicopters, Inc. v. Avco Corp., 804 F.2d 1367, 1370 (5th Cir. 1986). General jurisdiction involves a suit which does not arise from the nonresident's contacts with the forum state and can be asserted only over nonresident defendants who maintain "continuous and systematic contacts" with the forum state. Interfirst Bank Clifton v. Fernandez, 844 F.2d 279, 283 (5th Cir. 1988) (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404, 411 (1984)).

The court is of the opinion that the exercise of specific jurisdiction is appropriate under these circumstances. Here, defendants entered into agreements with a resident of this state and the agreements were to be performed "in whole or in part" here. The parties in this cause of action have engaged in extensive communications and negotiations in an attempt to secure present and future benefits from the purchase of Brandywine Island. As a result, the defendants have sufficient minimum contacts with the forum to warrant jurisdiction.

2) FAIRNESS

Additionally, the court cannot exercise jurisdiction over the defendants if it offends "traditional notions of fair play and substantial justice." International Shoe, 326 U.S. at 316.

A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."

Asahi Metal Ind. v. Superior Court, 480 U.S. 102, 113, 107 S.Ct. 1026, 94 L.Ed.2d 92, 105 (1987).

The court finds on the record before it that its exercise of jurisdiction is neither unfair nor unreasonable. The court concludes that the burden upon the defendant is not so great in this instance as to prevent the courts exercise of jurisdiction. As previously noted, defendants entered into a agreements with a Mississippi resident in an attempt to secure the purchase of Brandywine Island. The defendants' activities in Mississippi are such that they could reasonably foresee being hailed into this forum's court. Further, the State of Mississippi has an interest in providing citizens who do business in this state, such as Warrington and Spectrum, redress against other individuals whose acts in Mississippi cause damages in this state.

Plaintiffs have made a prima facie showing that defendants are amenable to service of process under the Mississippi long-arm statute and that exercise of jurisdiction over these defendants comports with the dictates of the due process clause of the Fourteenth Amendment. Accordingly, defendants' motion to dismiss for lack of personal jurisdiction will be denied.

II.

VENUE

Alternatively, defendants move to dismiss for lack of venue. In response to the motion, plaintiffs stated that venue was proper in either the Southern or Northern District of Mississippi. Plaintiffs further elaborated that, although they believed that the Greenville Division of the Northern

District of Mississippi was more convenient for all parties involved, they had no objection if defendants want this matter transferred to the Southern District.

Venue in civil actions is governed by 28 U.S.C. § 1391(a):

A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

Plaintiffs submit that "venue is proper in either the Southern or Northern District" of Mississippi. As argued by defendants, this conclusory statement does not provide ample proof of proper venue. In their complaint, plaintiffs raise two principal claims. Plaintiffs request this court to rescind agreements entered into between them and defendants and also charge C. Gibson with legal malpractice. The agreements in question deal with the purchase of Brandywine Island. As discussed, a promissory note, which is secured by real property located in Washington County, Mississippi, was assigned by Spectrum to Rivertimber in order to facilitate the purchase of Brandywine Island. Although the agreements reference the aforesaid promissory note, the court is of the opinion that this alone does not establish that a "substantial" part of plaintiffs' claims occurred in this district. In regard to their claim of legal malpractice, there can be no question that the alleged wrongs giving rise to liability on that claim occurred in the Southern District of Mississippi. The only connection this action has with this district is that real property which secures a promissory note at issue is located in Washington County, Mississippi. The court is of the opinion that this connection does not establish that venue is proper in this district.

Although venue is improper in this district, the court, pursuant to 28 U.S.C. 1406(a), will transfer this action to the Southern District of Mississippi.

The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

28 U.S.C. § 1406(a). If venue is improper the district court may dismiss or transfer depending on the interest of justice. Whether dismissal or transfer is appropriate lies within the sound discretion of the district court. See 15 Charles A. Wright, Federal Practice and Procedure 3827, at 261-62 (2nd Ed. 1986). For the reasons below, the court is of the opinion that transfer, rather than dismissal, is in the interest of justice in the present cause of action.

James W. Warrington presently resides in the Rankin County, Mississippi, and Spectrum is also located there. Rankin County, Mississippi is in the Southern District of Mississippi. Significant allegations in this complaint occurred in that district. Specifically, if plaintiffs can establish the charge that C. Gibson undertook to represent them in the USF&G litigation, that litigation took place in the Southern District of Mississippi and claims surrounding such would be better brought there. Also, the parties entered into at least some of their agreements involving the purchase of Brandywine Island in Rankin County, Mississippi. As a resident of Rankin County, performance of portions of the purchase agreements, such as financing and sharing of proceeds from the purchase of Brandywine Island, will take place in Rankin County. Therefore, this cause of action could have been brought in the Southern District of Mississippi. Finally, the court recognizes that should it dismiss this complaint, plaintiffs will have the opportunity to refile in a district where venue is proper. Dismissal here will likely result in another lawsuit, whereas, transfer allows parties involved to continue this litigation from where it stands. In response to this motion, plaintiffs indicated that they "have no objection if the defendants want this matter transferred to the Southern District of Mississippi."

In summary, the undersigned finds that venue is not proper in the Northern District of Mississippi. However, the court is of the opinion that justice will be better served by transferring, rather than dismissing, this cause. Accordingly, pursuant to 28 U.S.C. 1406(a), this case will be transferred to the Southern District of Mississippi for further proceedings.

III.

FAILURE TO STATE A CLAIM

Defendants move for 12(b)(6) dismissal on plaintiffs' claim of legal malpractice against C. Gibson. A claim is not subject to dismissal unless it appears to a certainty that no relief can be granted under any set of facts that can be proven in support of its allegations. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Although there is little evidence to support Warrington's claim that C. Gibson undertook to represent him in the USF&G litigation, the court is of the opinion that his complaint meets the pleading requirements and, therefore, dismissal is not warranted at this stage of the case.

CONCLUSIONS

For the foregoing reasons, the defendants' motion to dismiss pursuant to F.R.C.P. 12(b)(2) for lack of personal jurisdiction will be denied. Likewise, defendant C. Gibson's motion to dismiss pursuant to F.R.C.P. 12(b)(6) for failure to state a claim upon which relief can be granted as to plaintiffs' claim of legal malpractice will be denied. Defendants' motion to dismiss for improper venue under F.R.C.P. 12(b)(3) is denied and, pursuant to 28 U.S.C. § 1406(a), this matter will be transferred to the Southern District of Mississippi.

An order in accordance with this opinion shall issue this ____ day of June, 1995.

United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION**

JAMES W. WARRINGTON, ET AL

Plaintiffs

v.

Civil Action No. 4:94CV119-D-O

**CHARLES SIDNEY GIBSON and
JACK A. GIBSON**

ORDER

Pursuant to a memorandum opinion entered this day, it is hereby **ORDERED** that:

1) defendants' motion to dismiss pursuant to F.R.C.P. 12(b)(2), 12(b)(3), and 12(b)(6) be,
and it is hereby, **DENIED**;

2) pursuant to this court's authority under 28 U.S.C. § 1406(a), this cause of action be, and
it is hereby, **transferred** in its entirety to the Southern District of Mississippi for further proceedings.

All materials considered by the court in ruling on defendants' motion are hereby incorporated
into and made a part of the record in this cause.

SO ORDERED this ___ day of June, 1995.

United States District Judge